

CRISES, CRISIS RHETORIC, AND COMPETITION IN LEGAL EDUCATION: A SOCIOLOGICAL PERSPECTIVE ON THE (LATEST) CRISIS OF THE LEGAL PROFESSION AND LEGAL EDUCATION

Bryant G. Garth*

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INTRODUCTION

The very strong position of law in the United States is the starting point for understanding the proliferation of crisis rhetoric. The sociology of law teaches: (1) if lawyers occupy central positions in the state and the economy, there will be competitors who will seek to challenge that position; (2) lawyers (and legal scholars as a subset of that group) build their careers and reputations in part by forming alliances with dissident groups and potential competitors and seeking to speak on behalf of them; and (3) lawyers tend to maintain rather than threaten professional hierarchies. Lawyers, to put it another way, seek to be on both sides of every issue, and the ability to appear on both sides is a measure of professional strength. Further, professional hierarchies shape the arguments that they make. Lawyers rarely seek to topple the structures that sustain them.

The lawyer or law professor today who denounces the law degree and the current structure of legal education typically aims mainly at less prestigious law

* Professor of Law, Southwestern Law School and the University of California-Irvine School of Law

schools and law graduates. Less prestigious, depending on the position of the author, might include only schools way down in the *U.S. News* ranking, or it might simply be schools that the author feels are enough below the one occupied by the author to safely be criticized. This critical position attracts publicity and professional recognition—all the more so because it comes from a lawyer—a person of some status.¹ A time of economic depression or quasi-depression makes the claim gain attention and credibility—especially from those who resent the strong position of lawyers in American life. The basic theme of this article is that we should not forget that it is the strong position of law and lawyers that produces and reproduces this process—without in fact dislodging law from its position of strength. It is hard to see lawyers losing when the argument about lawyers is largely controlled by lawyers.

This Article will begin by examining the rhetoric produced around the time of the Great Depression, the closest analog to the current situation. The doomsday arguments will seem familiar today—too many lawyers, a stagnant legal economy, and a sense that the trouble for the profession comes especially to the graduates of the schools that traditionally have provided access to immigrants, minorities, and other relatively disadvantaged groups. After highlighting those arguments, a number of which came from prestigious law school deans, I will cite the literature that Legal Realists such as Lloyd Garrison and Karl Llewellyn eventually produced to counter the crisis rhetoric. Few now remember the fervor of the debates at the time.

The next Part will examine the rhetoric of crisis today. We see the same rhetoric of a decline in demand, caused in part by competitors cutting into traditional business. Once again, economic recession brings out the rhetoric of too many lawyers and not enough demand for their services. Of course, the situation today is not precisely the same as in the 1930s. The schools that provided access to minorities and immigrants were quite inexpensive in the Depression era. Now, nearly all law schools have become quite costly, including those that are more likely to serve those from lower socio-economic strata. It is also no longer legitimate to claim that immigrants, or any relatively marginal social group, are not up to the professional standards necessary to become lawyers. Yet, I will maintain, the situation today has more in common than not with the Depression era. Not only is much of the rhetoric the same, but also, as in the 1930s, the critics today promote a position that would harden professional hierarchies and reduce access to the advantages of a legal education and law degree.

Those producing the current generation of jeremiads have become famous in the legal profession, making very similar arguments to what was stated in the Depression era. They have gained considerable attention in the popular media

1. In *From Civil Litigation to Private Justice: Legal Practice at War With the Profession and Its Values*, 59 BROOK. L. REV. 931-60 (1993), I wrote about lawyer advocacy on both sides of issues of public debate about the profession.

as well—delighting those who resent the lawyers' position in the United States. They are now quoted on issues outside of legal education. They have been very successful from an entrepreneurial point of view. They have made visible and articulated an argument that was not well-represented in the literature.

Unfortunately, the recipes for reform that these advocates posit have all too much in common with the recipes from the 1930s. The high tuition is stated as a reason for the non-affluent and lower credentialed students to forego whatever potential benefits they would have obtained from the law degree. They are told that any intuitions they felt about the advantages of a law degree in the United States are the product of misinformation and optimism bias.

This debate so far is relatively one-sided. Today's New Legal Realists² and empirical legal scholars have not yet taken up the challenge of exposing problems with the current rhetoric of crisis. It may be too early in the debate, however, for any counter-attack to gain any credibility. Maybe the counter-attack, as in the 1930s, will have to await some kind of return to relative prosperity.

A simple conclusion could be that we simply wait out the crisis and let the process play out. The strength of the legal profession, I would argue, is once again demonstrated by the dominance of lawyers on both sides of the argument about the value of law school. This same entrepreneurial flexibility and quickness to sense an opportunity is what explains the ability of ever larger populations of lawyers to invent new demands and new products that employ their services. It may not be the time to write off investments in legal education and the degrees they provide.

Instead of stopping with that insight, however, I will make a preliminary effort to add what I consider to be more realism to the debate. It may be too early, but I want to offer a few thoughts. I expect many others to enter the debate as the economy rebounds and the crisis rhetoric loses its urgency, and there will be more data and research in the coming several years in part because of the energy of those who have promoted the feeling of crisis.³

I will suggest some ways to put the today's crisis in context. There are some differences that make the present situation scary and potentially dangerous, and the critics have made those very clear. The differences between today and the Depression era, however, are not in the value of a legal education and law degree. The best data available, from the two published reports of the After the J.D. Project centered at the American Bar Foundation, tell us that law grad-

2. See, e.g., Howard Erlanger, Bryant Garth, Jane Larson, Elizabeth Mertz, Victoria Nourse, & David Wilkins, *Is It Time for a New Legal Realism?*, 2005 WIS. L. REV. 335 (2005).

3. The After the J.D. Project, discussed below, will also have a new wave of data showing what did happen to the cohort of lawyers in the recession. *AJD Data Access*, AM. BAR FOUND., http://www.americanbarfoundation.org/publications/AftertheJD/AJD_Data_Access.html (last visited December 31, 2012).

uates truly value their law degrees and do not regret attending law school—despite their debt.⁴

But in order to understand that debt, we need to understand more realistically the competitive processes that produce the high tuitions and concomitant debt. The main difference from the Depression era is that legal education today is characterized by intense competition among the law schools (and law professors). There is also much more competition within the corporate sector of the legal profession. The competition is not the result of *U.S. News*. It comes from market conditions.

As the economist Caroline Hoxby showed for undergraduate education, rising tuition is not an example of the failure of the market, but rather is a reflection of an increase in competition among schools, which includes competition for rankings.⁵ A more competitive market, to be sure, will have winners and losers, but they will not necessarily align with traditional professional hierarchies. Hoxby's insights about competitive educational markets help provide a more dispassionate and accurate account of where we are and how we got there.

I. THE GREAT DEPRESSION'S RHETORIC OF CRISIS IN THE LEGAL PROFESSION

One theme of the rhetoric of the Depression in the 1930s was the permanent loss of legal business to groups outside the legal profession. This theme was repeated in numerous articles and speeches. According to James Gifford in *The Nation*,

Title companies took over the searching of titles. Workmen's compensation began to eliminate litigation over industrial accidents. Summary trial, probation, and penal boards are removing much of the importance of the defense of criminals. Practice in taxation matters and before the Interstate Commerce Commission has fallen into the hands of specialists. The bank and trust company has threatened to poach on the sacred fields of the drafting and probating of wills.⁶

4. RONIT DINOVTIZER, ET AL., THE NALP FOUND. FOR LAW CAREER RESEARCH AND EDUC. & THE AM. BAR FOUND., AFTER THE JD: FIRST RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS 47, 71 (2004) [hereinafter AFTER THE JD]; RONIT DINOVTIZER, ET AL., THE AM. BAR FOUND. & THE NALP FOUND. FOR LAW CAREER RESEARCH AND EDUC., AFTER THE JD II: SECOND RESULTS FROM A NATIONAL STUDY OF LEGAL CAREERS 46, 80-81 (2009) [hereinafter AFTER THE JD II].

5. Caroline M. Hoxby, *How the Changing Market Structure of U.S. Higher Education Explains College Tuition* 1 (Nat'l Bureau of Econ. Research Working Paper No. 6323, 1997).

6. James P. Gifford, *Lawyers and the Depression*, 137 NATION 236, 237 (1933).

According to an article entitled *Too Many Lawyers?*, "This competition outside the law profession proper cannot be overestimated."⁷ Bar leader and future Supreme Court Justice Robert Jackson opined that the decline in markets foretold "a declining prestige of courts and a corresponding decline in the prestige of the legal profession."⁸ The legal market, they suggested, was at best static and might even be shrinking. The then-version of outsourcing—competition from title companies, banks, trust companies, and many others—was permanently threatening the livelihood of the practicing bar, and there was not enough new business on the horizon to compensate for that loss.

The problem of too many lawyers, the articles tended also to note, was especially related to a certain kind of lawyer. The oft-repeated concern of those at the top of the profession—the WASPS in corporate law firms—was that the wrong kind of people were being admitted into the legal profession. As well-documented in Jerold Auerbach's *Unequal Justice*,⁹ this attack on the YMCA law schools, night schools, proprietary schools, and their graduates surfaced again and again in the 1930s. The dean of Columbia Law School accordingly emphasized in 1932 that the overcrowding did not apply to high quality and ethical lawyers:

The kind and quality of work which a law school can do are conditioned by the capacities of the students as well as by the abilities of the Faculty. Substantial improvement in legal education is not likely to be realized if large numbers of men are admitted to the schools who are incapable of complying with the standards sought.¹⁰

Low standards for admission, he went on to aver, went with lower standards in ethics:

The insistence of bar associations that the law schools should place greater emphasis upon the study of legal ethics is, perhaps, justified. But the teaching of legal ethics to law classes comprising large numbers of men who are obviously unworthy in knowledge or in character of membership in the profession will have little effect upon the conditions at the bar which are arousing the indignation of the public and of the better element in the profession.¹¹

The *Saturday Evening Post* picked up this theme, drawing on Harvard Dean Roscoe Pound to show the problem of overcrowding at the bottom of the profession:

In fact, Dean Pound, of the Harvard Law School, declares that one of the serious economic wastes in this country comes from ill-trained lawyers and those

7. Rex Stewart, *Too Many Lawyers?*, 8 PRAIRIE SCHOONER 85, 86 (1934). See also, e.g., Isidor Lazarus, *The Economic Crisis in the Legal Profession*, 1 NAT'L LAW. GUILD Q. 17 (1937).

8. Robert H. Jackson, *An Organized American Bar*, 18 A.B.A. J. 383, 383 (1932).

9. JEROLD AUERBACH, *UNEQUAL JUSTICE* (1977). A more recent study that reviews many of these themes in a broad professional context is Michael Ariens, *American Legal Ethics in an Age of Anxiety*, 40 ST. MARY'S L. J. 343 (2008).

10. Young B. Smith, *Law Schools and Lawyers*, 18 A.B.A. J. 480, 482 (1932).

11. *Id.*

lacking professional spirit, who crowd the lower ranks of the bar and consume the time and energy of the courts.

It is the public, adds Dean Pound, which ought to be pushing for better things in the training of the rank and file of the bar, especially in the larger cities.¹²

To summarize prevailing themes, leaders in the profession were concerned that lawyers had, to some extent, lost their monopoly on the provision of legal services. The literature suggests that administrative courts would shrink litigation rates, that real estate agents and title companies would cut into legal business in real estate, and that workmen's compensation would cut the demand for personal injury work. In short, the crisis rhetoric of the Depression era described a future where the demand for lawyers would be static, or perhaps even shrinking. To be sure, the bar leaders mounted a counter-offensive against the unauthorized practice of the law, but they had little confidence in the effort to turn the clock back. To catastrophize further, bar leaders such as Robert Jackson feared that perhaps law was a declining profession in terms of both prestige and remuneration.

The pessimists, including the deans of several of the most prestigious law schools, were nevertheless careful to suggest that the overcrowding was at the bottom of the profession. The questionable ethics and skills of those at the bottom argued for reform and contraction within the schools that served immigrants and minorities—the urban and proprietary law schools in particular. The Great Depression of the 1930s, indeed, provided an opportunity for those deans to emphasize the distinction between the leading law schools and those providing access to what Harvard's Pound termed the “lower ranks” of the bar.

There were reactions to these criticisms, although they tended to emerge late in the 1930s after the Depression was already on the wane. In 1939, Francis M. Shea, Dean of the newly accredited University of Buffalo Law School, a New Dealer and later a co-founder of the law firm Shea & Gardner, stated that:

Even if there be waste, as I am prepared to concede, in the mass production of poorly trained men by schools of less standing than the great university schools of the country, I am not convinced that the waste is not justified. It means that leadership may spring from the rank and file, may spring from minority groups, and gets its training in the law which appears to be one of the sure ways of qualifying for political leadership. The process of developing leadership in democracies is necessarily a wasteful process. I premise again that democracy implies the absence of a ruling class which is self-perpetuating.¹³

Leading Legal Realists, including notably Lloyd K. Garrison and Karl Llewellyn, were both quite skeptical of the crisis rhetoric. Llewellyn, in his fa-

12. Editorial, *Overcrowded Occupations*, SATURDAY EVENING POST, July 15, 1933, at 22.

13. Francis M. Shea, *Overcrowded?—The Price of Certain Remedies*, 39 COLUM. L. REV. 191, 208 (1939).

mous article on *The Bar's Troubles, and Poulitices—and Cures?*, published in 1938, noted the link of the crisis rhetoric to the effort to stop the so-called “unauthorized practice of the law.”¹⁴ He was very skeptical of any effort to try to increase legal markets by punishing those who were allegedly taking away legal business from lawyers.

Garrison systematically studied the issue of too many lawyers and not enough work, framing the inquiry as follows:

The great increase in law school enrollment from 1920 to 1928 occasioned the first of a series of assertions that the bar generally is overcrowded. Fresh assertions were made after the publication of the 1930 census, which showed that during the decade ending in 1930 the bar had increased more rapidly than the general population. As the depression [sic] made its effects felt upon the lawyers, who for the first time began seriously to take stock of their position, the conviction that the bar had become overcrowded gained general currency.¹⁵

Garrison not only undertook a systematic Wisconsin study, concluding that there was in fact a demand for more lawyers rather than an oversupply, but he also offered some general reflections:

At the very least, these figures indicate a rough but nevertheless very real adjustment of the number of lawyers in particular localities to the changing needs of those localities, and should cast at least some doubt upon the wisdom and workability of proposals for artificially restricting the size of the profession.

Not only does society furnish, however crudely, its own controls, we have as yet no criteria upon which to base any assumptions as to what in a given time and place the proper number of lawyers should be.¹⁶

II. RECENT CRISIS RHETORIC: A RECURRING PATTERN

We see quite a number of the same themes in the current crisis rhetoric. First, the market is perceived to be more or less stagnant, certainly not able to expand to meet the supply of lawyers. According to William Henderson and Rachel Zahorsky:

Whether BigLaw lawyers, boutique specialists or solo practitioners, U.S. lawyers can expect slower rates of market growth that will only intensify competitive pressures and produce a shakeout of weaker competitors and slimmer profit margins industrywide. Law students will find ever-more-limited opportunity for the big-salary score, but more jobs in legal services outside the big

14. Karl N. Llewellyn, *The Bar's Troubles, and Poulitices—And Cures?* 5 LAW & CONTEMP. PROBS. 104, 105 (1938).

15. Lloyd K. Garrison, *A Survey of the Wisconsin Bar*, 10 WIS. L. REV. 131, 134 (1935).

16. *Id.* at 137.

firms. Associates' paths upward will fade as firms strain to keep profits per partner up by keeping traditional leverage down.¹⁷

Paul Campos makes the statement bluntly: "The ongoing contraction in the employment market for new lawyers has combined with the continuing increase in the cost of legal education to produce what many now recognize as a genuine crisis for both law schools and the legal profession."¹⁸ A number of others in law journals, blogs, and the popular media, notably including blogger Matt Leichtner of *Law School Tuition Bubble*, make the same argument about the legal market.¹⁹ As did the Depression-era purveyors of crisis, they posit a trend of slow or no growth in demand for the skills of lawyers (or in the creation of new legal products by legal entrepreneurs).

The source of the contraction, as in the 1930s, is deemed to be competitors who take away legal business from a more or less static market. According to Campos in an interview for the *Daily Beast* blog of *Newsweek*, the problem for lawyers is

being caused by technology and outsourcing. Machines can now do many things that lawyers did formerly, such as e-discovery. In addition, corporations have found that much work which used to be performed by lawyers can be performed quite adequately by much cheaper sources of labor—paralegals, compliance officers, and even people in India.²⁰

New technologies make it so that associates, for example, are mercifully now spared the task of going through countless e-mails as part of pre-trial discovery, but that progress cuts down the need for associates. And much research

17. William D. Henderson & Rachel M. Zahorsky, *Law Job Stagnation May Have Started Before the Recession—And It May Be a Sign of Lasting Change*, A.B.A. J. (July 1, 2011, 3:40 AM CST), http://www.abajournal.com/magazine/article/paradigm_shift.

18. Paul Campos, *The Crisis of the American Law School*, 46 U. MICH. J.L. REFORM 177, 179 (2012).

19. Matt Leichter, *Law Graduate Overproduction*, L. SCH. TUITION BUBBLE, <http://lawschooltuitionbubble.wordpress.com/original-research-updated/law-graduate-overproduction> (last visited Dec. 31, 2012). According to a news story, "[R]oughly 45,000 students do graduate from law school each spring. Most of them have taken on significant debt. And despite the old saw about being able to 'do anything' with a law degree, they don't have the specific technical or quantitative skills to go into faster growing fields. While the overall unemployment rate for lawyers is a microscopic 2.1%, that doesn't take into account the trouble recent graduates are facing to find work that will soon pay off their debt. The industry is entering a period where it will be well oversupplied with talent. Unless a whole lot of old lawyers start retiring ASAP, that situation probably won't change." Jordan Weissmann, *What Do Lawyers and Bankers Have in Common? They Lost Jobs in 2011*, THE ATLANTIC MONTHLY, (Jan. 10, 2012, 1:30 PM EST), <http://www.theatlantic.com/business/archive/2012/01/what-do-lawyers-and-bankers-have-in-common-they-lost-jobs-in-2011/251130/#>. A discussion of the issues prior to the recession in a less passionate manner can be found in Daniel J. Morrissey, *Saving Legal Education*, 56 J. LEGAL EDUC. 254 (2006).

20. Megan McArdle, *The Perils of Law School: A Chat with Paul Campos, Author of Don't Go to Law School!*, THE DAILY BEAST (Sept. 24, 2012), <http://www.thedailybeast.com/articles/2012/09/24/the-perils-of-law-school.html>.

and even drafting can be outsourced to skilled lawyers in places like India and the Philippines.

Henderson and Zahorsky make the same point:

Technology is replacing many of the tasks formerly performed by lawyers. From a social point of view, this is very desirable because it drives down the cost of legal services and satisfies unmet legal needs. From an industry view, however, it can be a gut shot to the bottom line Lower-level “commodity” legal work is already being sent to developing markets like China, India and the Philippines because wages are lower and the multiplying workforce is eager.²¹

One well-known commentator, Bruce McEwan, cites figures stating that the legal process outsourcing business will grow from 2011 to 2014 from \$640 million to \$4 billion.²² Law business is expanding, just not business for lawyers.

The argument of a shrinking market is therefore made a little differently today than it was in the 1930s. In particular, the rhetoric of the Depression-era jeremiads came with the call to enforce bans against the “unauthorized practice of the law.” Today, there is a recognition that the prevailing faith in the market makes protectionist and monopolistic arguments unlikely to be fruitful, and the changes today are linked to the seemingly inexorable forces of globalization as well. No one dares argue for more enforcement of laws against unauthorized practice—although there have been “professional responsibility” concerns about outsourcing.²³ But the argument today otherwise is quite parallel to that of the 1930s.

What is fundamentally different today is the focus on high tuition as the central problem. The writers in the 1930s noted that the law schools outside of the private elite law schools were priced quite accessibly. Now the most oft-repeated argument against law school is that law schools are priced too high, leading to very high levels of borrowing made relatively easy by the federal government, and that the jobs available to many law graduates do not pay well enough to handle the debt. Paul Campos’s recent book highlights this line of reasoning.²⁴ Brian Tamanaha’s book *Failing Law Schools*, which has been central to the debate since its publication in the summer of 2012, makes an especially powerful case for a crisis based above all on high tuitions and education-

21. Henderson & Zahorsky, *supra* note 17.

22. Bill Henderson, *Straight Talk on the Woes of BigLaw*, by Bruce MacEwen, THE LEGAL WHITEBOARD (Oct. 14, 2012), <http://lawprofessors.typepad.com/legalwhiteboard/2012/10/straight-talk-on-the-woes-of-biglaw-by-bruce-macewen.html> (reposting Bloomberg Law, “Suicide Prices” & the Coming Crisis at Big Law Firms, YOUTUBE (Oct. 12, 2012), http://www.youtube.com/watch?v=Un9yg_uPGEY&feature=player_embedded (presenting an interview with legal consultant and blogger Bruce MacEwen)).

23. Pangea3, which is a global leader in outsourcing owned by Thomson Reuters, draws on a recent ABA opinion to combat the ethical concerns. David Perla, *ABA Blesses Legal Outsourcing*, PANGA3, <http://www.pangea3.com/aba-blesses-legal-outsourcing.html> (last visited Dec. 31, 2012).

24. PAUL CAMPOS, DON’T GO TO LAW SCHOOL (UNLESS) (2012).

al debt.²⁵ William Henderson links the high tuition to undergraduate tuition as well, making the crisis argument even more vehement: “Right now we—higher ed and the nation as a whole—are maintaining the illusion of prosperity through debt financing heaped on naive young people. This is immoral in the extreme. Moreover, in the long run, it is economic and political ruination.”²⁶

The remarkable rise of law school tuition in recent decades is well-documented by these writers. They also document the concomitant increase in indebtedness among law school graduates. This theme has been picked up by the popular press, including the *New York Times*.²⁷ The logic is simple. The only law graduates who will be able to service their debt, they argue, are those who obtain jobs working for corporate law firms. According to Tamanaha:

For any prospective law student trying to figure out the likely economic return on a degree, especially a student who borrows \$100,000 or more to pay for the education, it comes to this: What is one’s chance of landing a NLJ 250 [one of the largest 250 corporate law firms in the United States] job?²⁸

That starting position is available mainly to graduates of the elite law schools and those who do exceptionally well in other law schools.

The bi-modal starting salaries for legal careers mean that there are huge differences between the large corporate law firms and everyone else. Reporting on law graduates from 2010, for example, the National Association of Law Placement (NALP) states: “The left-hand peaks of the graph reflect salaries of \$40,000 to \$65,000, which collectively accounted for about 52% of reported salaries. The right-hand peak shows that salaries of \$160,000 accounted for

25. BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* (2012).

26. Bill Henderson, *Federal Funding of Higher Education—A Bubble that is Going to Burst*, THE LEGAL WHITEBOARD (Aug. 10, 2012), <http://lawprofessors.typepad.com/legalwhiteboard/2012/08/federal-funding-of-higher-education-a-bubble-that-is-going-to-burst.html> (“The only long-term solution is cost containment imposed on higher ed by reforming the terms of federal financing. The financing has to incentivize educational productivity—i.e., fewer tuition dollars expended to obtain better skills and learning as measured by marketplace earnings and innovation. No more \$100,000 checks from the federal government for sorting students by standardized test scores.”).

27. Kathy Kristof, *The Great College Hoax: Law Students in Heavy Debt*, FORBES, (Feb. 2, 2009), <http://www.forbes.com/forbes/2009/0202/060.html>; David Segal, *For Law Schools, a Price to Play the ABA’s Way*, N.Y. TIMES (Dec. 7, 2011), <http://www.nytimes.com/2011/12/18/business/for-law-schools-a-price-to-play-the-abas-way>; David Segal, *Law School Economics: Ka Ching!*, N.Y. TIMES (July 16, 2011), <http://www.nytimes.com/2011/07/17/business/law-school-economics-job-market-weakens-tuition-rises.html?pagewanted=all>; Staci Zaretsky, *Law School Loan Debt: A New Way to Walk Yourself Into Your Own Grave*, ABOVE THE LAW (Sept. 25, 2012, 6:30 PM), <http://abovethelaw.com/2012/09/law-school-loan-debt-a-new-way-to-walk-yourself-into-your-own-grave>.

28. TAMANAHA, *supra* note 25, at 143.

about 14% of reported salaries.”²⁹ The critics say only those around the right-hand peak can succeed given the debt required to obtain a law degree.

Herwig Schlunk’s pair of articles, cited favorably in the media blogs,³⁰ apply an economic analysis of the value of the law degree.³¹ Schlunk basically finds that the career is worthwhile to those who attend higher ranked schools, in part because his formula uses starting salary as the basis for all future earnings. The *Law School Transparency* website argues also that law school is not a winning proposition: “We reorganize the consumer data to present a clear, comparable, and fair picture of the present economic realities of attending law school to prospective students and policy makers, [showing] . . . the ever-growing disconnect between the cost of attending law school and graduate employment outcomes.”³²

According to the prevailing logic of the crisis advocates, the problem is above all with the lower-ranked law schools. Tamanaha states:

A sizable segment of law schools—low ranked schools with a high percentage of graduates bearing high debt—produce highly questionable results year in and year out. A significant percent of their graduates do not obtain lawyer jobs, and those that do tend to land low paid lawyer jobs that do not produce an income commensurate to the level of debt.³³

Tamanaha and others acknowledge that income-based repayment (IBR), which limits the loan payments of federal loans to a given percentage of the income, currently 15% and potentially going lower, can be helpful. They ease the actual burden of payments. But the benefits of the program are downplayed. According to Tamanaha, “Although IBR throws a lifeline to law graduates with high debt, saving them from defaulting on the loan, it is not ideal. . . . The IBR albatross may even affect matters like finding a marriage partner and how couples arrange their economic affairs.”³⁴

29. *Salary Distribution Curve*, NALP, <http://www.nalp.org/salarydistrib> (last visited Jan. 5, 2013).

30. Ashby Jones, *Mamas Don't Let Your Babies Grow Up To Be Lawyers*, WALL ST. J. L. BLOG (Nov. 13, 2009, 2:57 PM), <http://blogs.wsj.com/law/2009/11/13/mamas-dont-let-your-babies-grow-up-to-be-lawyers> (discussing Herwig J. Schlunk, *Mamas Don't Let Your Babies Grow Up To Be . . . Lawyers* (Vanderbilt L. & Econ. Working Paper No. 09-29, 2009), available at <http://ssrn.com/abstract=1497044>).

31. Schlunk, *supra* note 30; Herwig J. Schlunk, *Mamas 2011: Is a Law Degree a Good Investment Today?* (Vanderbilt L. and Econ. Working Paper No. 11-42, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1957139.

32. *Mission*, LAW SCH. TRANSPARENCY, <http://www.lawschooltransparency.com/about/mission> (last visited Jan. 5, 2013).

33. TAMANAHA, *supra* note 25, at 122.

34. *Id.* at 121-22. Interestingly, a recent *New York Times* article cites sources complaining that the overwhelming benefits of the IBR programs will go to a group of well-off individuals, in particular law graduates. Andrew Martin, *Well-Off Will Benefit Most From Change to Student Debt Relief Plan, Study Says*, N.Y. TIMES (Oct. 16, 2012), <http://www.nytimes.com/2012/10/16/business/change-to-student-debt-relief-will-help-well-off-the-most-report-says.html>.

The overwhelming theme of this crisis rhetoric is that those who attend the non-elite law schools are probably making a mistake, especially if they have to borrow substantially to pay for their education. They may not even get law jobs: "On a fairly consistent basis, this data indicates, about *one-third of law graduates in the past decade* have not obtained jobs as lawyers, and [the above chart] suggests that this is disproportionately the case at the lowest ranked law schools."³⁵ Campos concludes his book as follows: "Do something—anything—other than attend an average law school at the average price."³⁶ On the other hand, as Tamanaha notes, it appears to be a good bet if one is admitted into one of the elite schools:

Students from elite law schools have a solid chance of securing corporate law jobs that pay a salary sufficient to comfortably manage \$120,000 debt. . . . Top-fifteen law schools send 30-60 percent or more of their graduates to NLJ 250 firms each year, reaching a high in the 70 percent range before the recession. But the percentage of graduates securing these positions rapidly falls the further down the law school ranking one goes. . . . Outside the top 50 or so ranked law schools, particularly those not located in major legal markets, most place fewer than 5 percent, and in some cases none, of their graduates in these coveted jobs.³⁷

Tamanaha criticizes the elite schools for raising tuition so much, but the real criticism is for the schools lower in the ranks:

Taken in isolation, what these schools have done can be justified. Yale and Harvard distribute financial aid on an exclusively need basis, which in effect makes the students from higher socioeconomic classes help defray the costs of those from lower (in contrast to the reverse-Robin Hood merit scholarship arrangement at virtually all other law schools in which the bottom half of the class subsidizes the top). Law schools at the very top also have generous loan-forgiveness programs which provide genuine relief to their graduates in financial distress. The economic value conferred by a degree from a top law school handily exceeds current prices. They have exercised restraint in the sense that they could charge even more and still fill their class. And students at elite institutions are taught by the leading lights in law.³⁸

In short, Harvard, Yale, Stanford, and a few others are just fine with their model of legal education at the top of the hierarchy. It may need tinkering but basically works. They not only provide access to the corporate positions, but also, in part because so many of the graduates go to corporate law, they have generous privately-funded loan forgiveness programs for those relatively few who obtain public interest positions or serve as prosecutors or public defenders. There may be debates about how many schools can be counted among the elite,

35. TAMANAHA, *supra* note 25, at 134 (emphasis in original).

36. CAMPOS, *supra* note 24, at 97.

37. TAMANAHA, *supra* note 25, at 112.

38. *Id.* at 133.

but the critics are not questioning the category and choices to attend elite law schools.

Unlike in the Depression, the deans of the elite schools no longer feel compelled to emphasize their distance from the schools lower in the hierarchy—at that time the Catholic and urban law schools that provided access especially to minorities and immigrants. The major critics tend now to come from bloggers and the set of schools just outside the so-called top rank, such as Washington University (Tamanaha), the University of Colorado (Campos), Indiana University-Bloomington (Henderson), and Vanderbilt (Schlunk). But the targets are again the schools that are easier to get into and tend to serve those who are relatively less privileged—less likely to have the enriched educational advantages that enhance the opportunity to gain access to elite schools. The popular press is happy to quote them and others.

Drawing on these academic critics in particular, David Segal of the *New York Times* has been the best-known journalist critical of law school tuitions and law schools lower in the hierarchy. His articles on law schools and legal education have reached potential law students everywhere. Segal sees the high tuition as simply overpaying professors and padding profits:

Those huge lecture-hall classes—remember “The Paper Chase”?—keep teaching costs down. There are no labs or expensive equipment to maintain. So much money flows into law schools that law professors are among the highest paid in academia, and law schools that are part of universities often subsidize the money-losing fields of higher education.³⁹

Elsewhere, Segal again places an emphasis on professor salaries: “Which is why many law school professors privately are appalled by what they describe as a huge and continuing transfer of wealth, from students short on cash to richly salaried academics.”⁴⁰

The rising tuition and debt has social justice implications, Tamanaha posits, that liberal law professors tend to neglect:⁴¹

39. David Segal, *Is Law School a Losing Game?*, N.Y. TIMES, at *1 (Jan. 8, 2011), <http://www.nytimes.com/2011/01/09/business/09law.html?pagewanted=1>.

40. *Id.* at *2.

41. TAMANAHA, *supra* note 25, at 134. Tamanaha takes on the so-called liberals at several points:

Liberal law professors today would doubtless condemn the elite-dominated ABA at the turn of the twentieth century for raising the cost of legal education in a way that restricted access by the poorer classes to the profession. Economic barriers to the legal profession are once again a central issue in a fight over the regulations that govern legal education. This time liberal law professors, in the name of high quality legal education and fairness to colleagues, are the ones staking out the higher cost position. Both then and now, arguments were couched in the public good. One difference is that the elite bar then at least was consciously aware that they were restricting access (for what they thought were legitimate reasons), whereas law professors today apparently have blinders on that prevent them from seeing this consequence.

Id. at 35.

Students from middle class and poor families frightened by the specter of taking on insurmountable debt will increasingly forgo law school. Current law graduates are compelled by their debt to seek corporate law jobs that many do not otherwise desire. Our tuition-scholarship matrix [the relative absence of need-based scholarships as schools bid for students with higher credentials] helps the wealthy consolidate their grip on elite legal positions.⁴²

In order to become more accessible, these critics argue, the costs of legal education must come down.

The blame for high tuition is deemed to be ABA regulation, inhibiting experimentation with low cost no-frills legal education; and high salaries for law professors, who are said to be overpaid and underworked with too low teaching loads. Remedies accordingly are deregulation, lower salaries, higher teaching loads, and such alternatives as two-year programs. These remedies can be placed in some context below, but the starting point is what to do in the absence of this kind of reform.

The Depression-era proposals were, at best, thinly veiled attacks on the law schools that provided access to minorities and immigrants. Proposed remedies included closing down the schools, preventing ostensibly unqualified and immoral individuals—typically from immigrant groups and lower socio-economic backgrounds—from becoming lawyers. Today, the argument is couched in favor of access to law school for the relatively disadvantaged, but the result looks quite similar—an effective denial of access in the name of saving lower classes from “bad decisions.”⁴³

Campos suggests that, in the interests of the students themselves, the loans should dry up for law students: “In a well-functioning credit market, it shouldn’t be possible for people to borrow amounts of money that they have no realistic prospect of paying back.”⁴⁴ Further, he asks, “Why is the federal government issuing billions of dollars of taxpayer subsidies every year to produce twice as many lawyers as the economy can absorb?”⁴⁵ Finally, he advises prospective students: “If you don’t come from a privileged background, even the most elite law schools have become dangerous propositions.”⁴⁶ More particularly, he counsels against attending if one has to pay more than \$10,000 in tuition.

As with other commentators, including Tamanaha, Campos insists that the market is not working properly because of “optimism bias” among students confident that they will do well and win jobs in corporate law firms.⁴⁷ Prospec-

42. *Id.* at 150.

43. Gowri Ramachandran analogizes the reaction today quite perceptively to the Victorian response to prostitution—a denial of opportunity for their own good. Gowri Ramachandran, *Lawyers as “the Great Social Evil,”* 62 DEPAUL L. REV. (forthcoming 2013).

44. CAMPOS, *supra* note 24, at 46.

45. *Id.* at 51.

46. *Id.* at 45.

47. *Id.* at 18, 20. *See also*, TAMANAHA, *supra* note 25, 144.

tive students simply cannot understand that attending law school—unless one of the elite schools—is bound to be a losing proposition for all but a few. Matt Leichtner, blogger for the *Law School Bubble*, also supports the denial of access perspective: “Regardless of what *U.S. News* wants us to believe, the onus is on law schools to demonstrate they are adding value for their costs, and their resistance to doing so indicates they are no longer worthy of access to federal student loans and public subsidies.”⁴⁸

Tamanaha’s less draconian solution is to give students the choice of a low-cost law school, including more two-year programs. He believes that the relaxation of ABA standards would pave the way for such schools to thrive. He understands the implications of channeling less privileged students to such schools:

Liberal egalitarians will likely protest that the no frills law school argued for in the previous chapter and the two-year law school advocated here would be dumping grounds for the middle class and the poor. This is true. Few children of the rich will end up in these law schools, if they are allowed to exist. But a more apt description than “dumping ground” would be “affordable access to becoming an attorney.” As things now stand, the “dirty, not so hidden secret in all this is that the ‘heaviest debt burdens the lawyers least able to pay.’”⁴⁹

Tamanaha hopes to provide access, but to law schools that will operate in a different legal market than the ones that serve more privileged students. Recognizing that the odds are against success in terms of a job in corporate law firms for those who do not attend the most elite schools, Tamanaha would promote access but at a cost that he recognizes. He would make it substantially more unlikely still that the high paying corporate jobs would be available to those attending lower ranked law schools.

Furthermore, if the low cost alternative does not gain traction, which is certainly one possibility, Tamanaha would join with Campos in strongly discouraging less privileged students from attending law school at all. The practical result, not surprisingly, would likely be quite similar to what the critics of law schools advocated in the 1930s—limit law school to those who can get into the more elite schools, meaning as a practical matter mainly those from relatively privileged backgrounds.⁵⁰

As in the 1930s, a group of legal professionals has fired up a public well aware of law and lawyers’ power in the United States, assured them that law is not so great a career and may be permanently on the decline, gained substantial

48. Matt Leichter, *The Juris Doctor is ‘Versatile’ Thanks Mainly to Numerous Logical Fallacies*, THE AM. LAW DAILY (Aug. 14, 2012), http://www.americanlawyer.com/PubArticleALD.jsp?id=1202567415810&The_Juris_Doctor_is_Versatile_Thanks_Mainly_to_Numerous_Logical_Fallacies.

49. TAMANAHA, *supra* note 25, at 27 (quoting Daniel J. Morrissey, *Saving Legal Education*, 56 J. LEGAL EDUC. 254, 269 (2006)).

50. The relationship between privileged backgrounds and attendance at elite law schools is well documented. See AFTER THE JD, *supra* note 4.

prominence in the media, and at the same time reproduced the hierarchy of law schools and the legal profession. Those who cannot get into the schools that overwhelmingly feed corporate law firms are told not to go to law school at all unless, in the extreme case, they have family resources to pay the cost without borrowing.

Those who have been making these arguments have enjoyed great success. Indeed, there are bloggers today whose main mission is to heap scorn on those who suggest, for example, that a law degree may be useful for a business career.⁵¹ They have also had an impact on applications to law school, which have declined substantially for the past two years. The advocacy of this anti-law school barrage of invective has persuaded quite a few commentators as well as future students that law school is not worth the investment.

Maybe the critics are correct, and law will not be the career ticket that it has been in the United States in the past, but my point is simply that the process today is strikingly familiar to what occurred in the 1930s—the period most analogous to the current one. As we all know, despite the declining demand foreseen in the 1930s and the specter of more competition from non-lawyers, the legal profession returned to prosperity.

What is different today, as noted above, is that tuitions and debt are far higher than in the past. And the arguments for “too many lawyers” are based on different details—outsourcing and technology—than in the past. But, at the very least, we should be chastened from the rhetoric and experience of the Depression era from too glibly preventing access to the advantages that do come with a law degree.

III. NEW LEGAL REALISM ABOUT THE VALUE OF A LAW DEGREE

It is too early to conclude that the law degree today is a good or bad investment. As I have suggested, my opinion is that the vitriol and delight that goes with the literature of catastrophe for the legal profession reflects the enduring strength of the law degree, not its weakness. It is newsworthy to claim that the legal profession has lost its power, not that graduates of business school, film school, journalism school, or medical school do not have great career prospects. Articles about problems with the other degrees do not get the same attention.⁵²

From a legal sociological position, it still appears that law school is the degree that attracts the largest proportion of the best connected, most talented, and

51. See, e.g., *INSIDE THE LAW SCHOOL SCAM*, Elie Mystal, *ABOVE THE LAW*, <http://abovethelaw.com/author/elie-mystal/>

52. The *New York Times* only infrequently takes up the MBA, for example. See, e.g., Abby Ellin, *Was Earning That Harvard M.B.A. Worth It?*, *N.Y. TIMES* (June 11, 2006), <http://www.nytimes.com/2006/06/11/business/yourmoney/11harvard.html?pagewanted=all>.

most ambitious individuals in the United States,⁵³ and that it makes sense because of the powerful position of law in the governance of the state and the economy. Indeed, while not the purpose of this Article, the greater role for law in the governance of the global economy, which has accompanied the U.S.-style globalization, accounts for the tremendous interest of non-U.S. law graduates in obtaining graduate law degrees, especially the LLM, in the United States.⁵⁴

Late in the 1930s, as noted above, legal realists such as Karl Llewellyn and Lloyd Garrison began to rebut some of the hyperbole that characterized the Depression-era attacks on law schools and legal careers. Some of the insights they raised still ring true. As quoted before, Francis Shea argued that, even if many of the law schools were not ideal, "I am not convinced that the waste is not justified. . . . The process of developing leadership in democracies is necessarily a wasteful process. I premise again that democracy implies the absence of a ruling class which is self-perpetuating."⁵⁵ Garrison's words of wisdom, in my opinion, go well with the observation, "we have as yet no criteria upon which to base any assumptions as to what in a given time and place the proper number of lawyers should be."⁵⁶

I will return to these themes. In addition, however, I would like to sketch some elements for what today's New Legal Realists might bring to the debate. As noted at the outset, there is relatively little literature defending the law career so far, but we should expect much more. The success of the attack and the attackers, indeed, provides an opening for the advocates of the other side. My own contribution is just a starting point and introduction to some of the literature on the merits of the law career and the process that has led to today's high tuitions.

The starting point is the best data set available on careers on the legal profession today, the data collected as part of the After the JD Project headquartered at the American Bar Foundation.⁵⁷ The Project, the largest ever empirical study of the legal profession, tracks a national sample of more than 4,000 law graduates admitted to the bar in 2000. The Project surveyed these graduates three years into their careers and again seven years into their careers. The third wave of the survey is taking place now. The survey in 2007 took place before the collapse of the economy and therefore does not cover the fate of careers after the deep recession, but it provides a snapshot of the state of the profession at that time—something that arguably was "normal."

53. See AFTER THE JD, *supra* note 4, at 19 (noting the credentials of the AJD Project of law graduates).

54. See, e.g., YVES DEZALAY & BRYANT G. GARTH, THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES (2002).

55. Shea, *supra* note 13, at 208.

56. Garrison, *supra* note 15, at 134.

57. AFTER THE JD, *supra* note 4.

Tamanaha cites the data from the After the JD Project on the bi-modal distribution of starting salaries in the legal profession.⁵⁸ He notes the crucial difference in starting salaries between those who are able to land jobs in corporate law firms (immediately after law school or after one of the clerkships available mainly to graduates of high ranking schools—which leads to hiring bonuses from large firms) and those who work for the government, public interest, or small law firms. This difference is central, as we have seen, to the claim that law school is a good investment only for those who get these positions and presumably can pay off their student loans.

Part of the argument made by the crisis purveyors is that where one begins is where one ends. Schlunk as stated above makes this assumption his model. Others, including Henderson and Tamanaha, citing the classic work on the Chicago Bar by Heinz and Laumann,⁵⁹ make a more empirically based argument. They refer to the two-hemisphere thesis that was central to the analysis of the Chicago bar in 1974. Since the Chicago Bar is the only urban bar studied in this kind of depth, and the structures in Chicago are quite similar to other major cities, the analysis of the Chicago Bar is central to our understanding of the legal profession generally. According to Tamanaha, describing the profession generally:

The bar breaks out into two distinct hemispheres, with little career movement between them. Lawyers in the corporate law firm hemisphere had mostly graduated from prestigious law schools and were doing well financially; lawyers in the hemisphere of small firms and government jobs graduated from lower ranked local law schools and the median income of these lawyers had declined in real terms in the previous twenty years.⁶⁰

The argument of the original *Chicago Lawyers* merits closer attention. The Chicago Bar in the early 1970s was divided by occupational setting and by school attended, but it was divided more importantly by ethnic and religious background. The lack of mobility came to a great extent from the fact that the corporate law firms were bastions of white Protestants with few openings to minorities, Catholics, or Jews. Lateral hiring was also relatively rare, as was turnover, generally once one made partnership. The different hemispheres were

58. TAMANAHA, *supra* note 25, at 141. Campos in an interview states: “We’re just beginning to gather longer term longitudinal data. It appears that a solid majority of graduates of low-ranked law schools are either completely out of the profession within a few years of graduating, or are hanging on doing low-paid temporary work—document review in particular—or trying to scrape out a living as solo practitioners, which is getting increasingly difficult because of a combination of DIY lawyering (LegalZoom and the like) and wealth stratification.” McArdle, *supra* note 20, at 20.

59. JOHN P. HEINZ & EDWARD O. LAUMANN, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* (1982); JOHN P. HEINZ, ROBERT L. NELSON, REBECCA L. SANDEFUR, & EDWARD O. LAUMANN, *URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR* (2005).

60. TAMANAHA, *supra* note 25, at 141.

separated by religion, ethnic and national background, law school attended, and practice setting.

There is considerable evidence that the corporate bar in Chicago and elsewhere is far more open now in addition to being much larger.⁶¹ It is also far more competitive than it was in the past, which has led to much more mobility among different law firms by both partners and associates. Theodore Seto's recent article for the *Journal of Legal Education* thus shows that today the most elite corporate law firms—the National Law Journal's top 100 or 250—have a relatively large mix of partners from local law schools.⁶² The top ten feeder schools to the Chicago offices of the NLJ 100 national law firms now include Loyola, DePaul, Chicago-Kent, and John Marshall⁶³—hardly imaginable in 1974.

Some of these graduates from local law schools will no doubt have started in large law firms, and some recent work from the After the JD Project⁶⁴ and elsewhere suggests that those from non-elite schools may be more likely to gain partnership than the elite graduates who enter in much greater numbers. William Henderson notes, for example, "There is a very big pipeline between T14 [the top fourteen law schools] and BigLaw, but at some point before partnership, T14 associates tend to get off the train in disproportionately high numbers."⁶⁵ A higher proportion of non-top-fourteen law graduates accordingly make partner. Still, the access to entry level positions in large firms is available to those from non-elite schools only if they have very high grades.

Seto's work also reflects a different story about partnership in large law firms. A common pattern today that did not exist at the time of the original Chicago Lawyers study is for lawyers to start elsewhere—small firms, solo practice, government—and move into the large law firms later in their careers. The paradigmatic example of this mobility is lawyers who practice in areas that changed in attractiveness to corporate law firms—litigation in the 1970s and 1980s⁶⁶ for many corporate law firms, bankruptcy in the 1980s, and intellectual

61. See, e.g., Eli Wald, *The Rise and Fall of the WASP and Jewish Law Firms*, 60 STAN. L. REV. 1803 (2008).

62. Theodore Seto, *Where Do Partners Come From?* 62 J. LEGAL EDUC. 242, 244-45. (2012).

63. *Id.* at 249.

64. Ronit Dinovitzer & Bryant Garth, *Not That Into You*, AMERICAN LAWYER, Sept. 1, 2009, at 57 (showing that elite graduates are "not that into" large law firm partnerships according to After the J.D. interviews). The AJD Second Report data also show that those from "third tier" law students both desired and expected to become a partner more than graduates of the highly ranked law schools. AFTER THE JD II, *supra* note 4.

65. William Henderson, "Too Good for BigLaw": *The Statistician Edition*, THE LEGAL WHITEBOARD BLOG (Mar. 9, 2012), <http://lawprofessors.typepad.com/legalwhiteboard/2012/03/too-good-for-biglaw-the-statistician-edition.html>.

66. We tell this story in YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* (1996).

property more recently. The large firms acquire practices that they believe they need in order to serve their clients and prosper, and they hire the “first movers” who have established themselves in those areas. The general point is that it is no longer the case that those who start in small firms today are necessarily confined to a particular “hemisphere.”

Even if we examine only careers outside the corporate law firm sector, furthermore, an interesting item in the second wave of the *After the JD* study was that, between year three and year seven, the salaries of those outside the corporate law firms increased by a higher percentage than those within the corporate sector. Corporate law firm compensation grew by a greater absolute amount, but the others received very nice increases.⁶⁷ Solo practitioners went up by 60% compared to 33% for corporate law firms of more than 250 lawyers. Lawyers in business went up by 33% to a median of \$100,000. Further, at year seven, we asked the respondents the impact of their debt on their lives and decisions, and the respondents as a group did not paint a picture of hardship. They reported relatively little impact, for example, on whether or not to purchase a home (2.5 out of 7).⁶⁸

More importantly, with respect to the optimism bias that purportedly attracted individuals to law schools, the data at year three and year seven reveal overwhelming satisfaction with their decision to attend law school. The satisfaction was not higher for those in corporate law firms making the most money (78% high to moderate satisfaction for solo practitioners as well as for those in the large corporate law firms), nor for those who attended the most elite schools (32% extremely satisfied from top ten schools, 38% from so-called tier four schools).⁶⁹ In fact, one indicator of the role of the law degree was that African-Americans and Hispanics as groups were most likely to express moderate or extreme satisfaction with their decision to attend law school (80%).⁷⁰ Even after the fact, the best data we have show that those who opt for law school still perceive it as a path to upward mobility.

The *After the JD* respondents therefore tend to believe with reason that the law degree is a good investment. The crisis advocates who insist that such a belief before law school is evidence of “optimism bias” and bad—even misleading—information will have to explain why that optimism persists. A more realist account makes the decision look much better informed. Of course we can find loud voices expressing buyers’ remorse before law graduates find a point of entry into their career, but the structure of the profession and the opinions of those who gain access to it suggest that something more is going on than optimism bias.

67. *AFTER THE JD II*, *supra* note 4.

68. *Id.*

69. *Id.*

70. *Id.*

A more reasoned account of law school tuition is also essential if we are to assess the investment in law school more realistically. The reason that Tamanaha and others excoriate law schools is because of what they see as excessive—and needless—increases in tuition that then lead to excess debt.

IV. TUITION, THE MARKET FOR LEGAL EDUCATION, AND COMPETITION

Today's crisis literature blames the law schools, the ABA, the ease of obtaining loans, and the *U.S. News* rankings for escalating tuition. Tamanaha states that the rankings have led law schools to try to raise their prestige by promoting costly legal scholarship, reduced teaching loads, and more expensive faculty; by increasing the size of faculties to improve student-teacher ratios; and by raising merit- but not need-based scholarship assistance to buy students with relatively high credentials.⁷¹ The ABA, they argue further, has used accreditation standards to make it difficult to offer low cost alternatives, effectively allowing lower ranked law schools to keep their tuitions high and to mistakenly try to imitate the more elite schools.⁷² In Tamanaha's words, "Not all law school and not all law professors must be oriented toward research. Especially at lower ranked schools where graduates have a lower expected income, the students should not be made to bear a costly burden for faculty research."⁷³ Students, they suggest, have simply paid the tuition because of the lack of access to low cost alternatives and the relative ease of borrowing from the federal government. Law school tuitions have been unchecked.⁷⁴

The great increase in tuition for law school education parallels the increase in tuition for undergraduate education—even if greater increases occurred in the law schools. The question is what can be learned from the experience of undergraduate education. Caroline Hoxby, a prominent Stanford economist, has produced the leading analyses of the educational market generally. She states that the increase in tuition stems not from market imperfections, but rather from an increase in competition stemming from the decline in transportation costs and the increase in the information available to potential students: "Essentially,

71. TAMANAHA, *supra* note 25.

72. "Virtually all accredited law schools . . . have adopted teaching loads that provide professors ample time for scholarship. In effect, all accredited law schools are set up like research universities. Pursuant to the unified academic model promoted by AALS and enforced by the ABA, what might have developed as the law school equivalent of community colleges has been squashed." *Id.* at 62.

73. *Id.* at 78.

74. In the late 1980s, the problem of debt already had notable doomsayers, including John Kramer and David Chambers, and of course the past twenty years has seen even greater increases in tuition and debt. See David L. Chambers, *Educational Debts and the Worsening Position of Small-Firm, Government, and Legal-Services Lawyers*, 39 J. LEGAL EDUC. 709, 709 (1989); John R. Kramer, *Who Will Pay the Piper or Leave the Check on the Table for the Other Guy*, 39 J. LEGAL EDUC. 655, 686-87 (1989); John R. Kramer, *Will Legal Education Remain Affordable, by Whom, and How?*, 36 DUKE L.J. 240, 263-64 (1987).

higher education has been transformed from a series of local autarkies to a nationally and regionally integrated market in which each college faces many potential competitors for inputs and consumers.”⁷⁵ Colleges operating in relatively closed local markets—akin to autarkies—did not in fact raise their tuitions greatly. Instead, “opening trade in the college markets generates a substantial rise in average college tuition.”⁷⁶ It also leads to a more homogeneous student body in terms of credentials within each school, while at the same time an increasing differentiation in college “products.”

For undergraduate education, at least, Hoxby rejects the so-called Bennett hypothesis that the availability of federal loans explains the rise of tuition, suggesting that the Bennett hypothesis depends “on the existence of major market imperfections in the supply of college education (barriers to entry, very poor consumer information about the benefits of different colleges).”⁷⁷ She finds, in fact, that the market is working pretty well. She also rejects the idea of collusion among the colleges, arguing that “colleges are losing market power over time.” Hoxby contends that “tuition is rising because the open market has ignited quality competition.”⁷⁸

Competition in quality and services is key to the increases in tuition. According to Hoxby, relatively high quality students demand more from the schools they will attend. The competition in quality increases tuition and quality commensurate with the tuition increases. Quite simply, tuition does not go to profit, but to competition in services and educational quality. But the increase is different within different levels of selectivity. The most selective colleges increase tuition the most over time, and the least selective the least. And contrary to what one might expect if the market were not competitive, the most selective schools invest their even larger tuitions into the education and services of their students. Educational hierarchy is real in Hoxby’s analysis. Schools that are relatively unselective cannot invest as much, leading to more differentiation in the market. But the main point is that the large increases in tuition among less selective and more selective universities are in Hoxby’s analysis rational responses to increased competition.

From this perspective, the increase in law school tuition comes from a more competitive market. As with respect to undergraduates, potential students now have much more information about the relative quality and prestige of different law schools. The brightest students are less likely to attend the local alternative or state school in lieu of a more elite school than in the past, and the availability of inexpensive travel facilitates attendance away from home.

75. Caroline M. Hoxby, *How the Changing Market Structure of U.S. Higher Education Explains College Tuition* 1 (Nat’l Bureau of Econ. Research, Working Paper No. 6323, 1997), available at <http://www.nber.org/papers/w6323>.

76. *Id.*

77. *Id.* at 5.

78. *Id.*

Hoxby argues that the strategy of cutting tuition does not work as a means of attracting high quality students; instead, it leads to a self-fulfilling decline in student quality.⁷⁹ Law schools, according to this logic, raise tuition to offer inducements to students such as clinics, writing programs, academic support, journals, and enhanced career services. She does not dwell on this point, but the students also may be shopping for notable professors in programs that interest them. Students considering law schools that appear comparable in some respects shop, according to this argument, according to what they believe will help them get more out of their investment in law school. Schools that are relatively unselective cannot invest as much, leading to more differentiation in the market, but they compete as long as they can and as effectively as they can, including with tuition increases if they can be sustained. This analysis comports with the perspective of many deans that tuition increases have gone not into great increases in faculty salary—except for the few schools able to compete in the market for stars—but rather into services and programs. It also comports with the recent examination of law school costs by the U.S. Government Accountability Office, which concluded: “According to law school officials, the move to a more hands-on, resource-intensive approach to legal education and competition among schools for higher rankings appear to be the main factors driving law school cost, while ABA accreditation requirements appear to play a minor role.”⁸⁰

In a more recent article, Hoxby puts this competition into the perspective of what schools need to do to compete and survive:

Although very high-aptitude students are not getting a windfall on average, they are much better off than they were under autarky. In autarky, they were the captives of their local college and routinely underinvested in human capital. With integration, they experience massive investments in their human capital, and it is *colleges*, not they or their families, that face most of the risk and difficulty associated with financing such vast investments. If high aptitude students do not actually earn much after attending a very selective college, they just do not donate much. It is up to the college to ensure that the books eventually balance for every cohort of students. Put another way, for high-aptitude students, globalization represents a great *release* from market power. As they have become increasingly footloose, they have gained systemically.⁸¹

79. *Id.* at 18 (“Suppose a college competes by lowering the tuition it charges for its level of service quality. The college attracts new students, but a disproportionate number of the students have low demand and low quality. The college’s quality fails because of peer effects, and equilibrium is reestablished with the college at a lower price and lower quality.”).

80. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-20, HIGHER EDUCATION: ISSUES RELATED TO LAW SCHOOL COST AND ACCESS 2 (2009). The report also notes that public law school tuition increased because of large cuts in state funding. *Id.* at 29.

81. Caroline Hoxby, *The Changing Selectivity of American Colleges*, 23 J. ECON. PERSP. 95, 114 (2009).

The analogy would be law schools investing ever more in services and programs but facing the risk that they will not produce successful enough graduates to sustain the competition. I will return to the risks of the ever more competitive market, but the point here is that law schools are competing rationally according to this economic perspective.

I will not develop it here, but the same conclusions could be reached through a complementary sociological analysis. Following a line of sociological research inspired by the field theory of Pierre Bourdieu, law schools compete according to what is valued within the semi-autonomous legal field, and law students, faculty, and deans are well-aware of the hierarchy and the terms of competition.⁸² There is differentiation among the different law schools, to be sure, but law schools tend to compete by trying to show movement in the traits that are valued within the general law school world—hiring scholars, curricular innovation, better credentialed students, higher bar passage, ability to secure corporate jobs. Sociological study suggests also that competition in what is valued in the field tends to work together to promote the prosperity of the field as a whole. Scholarly investment, according to this analysis, is not self-indulgence, but rather is central to moving the field over time, staying relevant to new issues and concerns, and attracting talent. Ambitious students seek out law school because law school has historically produced leaders in the state and in the economy, and the investment by law professors in the issues of the day—including the worth of legal education, the concerns of disadvantaged groups, and the regulation of the economy, for examples—positions the law schools and the law to maintain that competitive advantage in rapidly changing times.

The observations on competition lead to an obvious point that has been neglected by most within the law school world. The *U.S. News* rankings did not cause the competition among law schools. *U.S. News* helps to shape that competition, but the competition would be just as intense without any one particular ranking. In particular, the competition for highly credentialed students and for academic reputation would exist under any implicit or explicit ranking.⁸³

Hoxby's work suggests the hypothesis that potential law students actually have a good sense of the market. They are seeking the law schools that will most invest in them on the theory that investment in services and programs will enhance their human capital proportionately. They have not sought the no-frills law school that is so assiduously championed by Campos and Tamanaha, among others, for those who cannot get into elite schools. In California, the Concord Law School, established in 1998, provides one very prominent and affordable online alternative, and the many California state-accredited law

82. See, e.g., PIERRE BOURDIEU & LOIC WAQUANT, AN INVITATION TO REFLEXIVE SOCIOLOGY (1992).

83. *U.S. News & World Report*, in other words, is not to blame for what Tamanaha observes: "Entering the twenty-first century, the competitive drive for scholarship by individual professors and law schools was on full blast—a major factor in institutional policy and the overall budget." TAMANAHA, *supra* note 25, at 77.

schools allow graduates to sit directly for the California bar exam. Still other California schools allow one to sit for the regular bar after passing the so-called “Baby Bar” examination. Yet students who have other options do not flock to these schools.

We do not know whether the wide range of student activities available today—law reviews, clinics, writing programs, certificates, student organizations, externships, moot court teams, trial advocacy, and negotiation competitions—make a difference in lawyer careers through the skills, experience, and networks that accompany these programs. Tamanaha and others lament the “wasted” and expensive third year of law school, but interestingly the After the JD respondents do not believe that the third year should be eliminated.⁸⁴ We also cannot know whether the law schools that improve the scholarly capital of their professors gain reputational or other benefits that help students succeed. There may be a relationship between hiring more distinguished scholars and increased fundraising from alumni, student engagement, and even employment opportunities for clerkships, for example. I am not sure of such relationships, but they merit exploration.⁸⁵

Students may actually know what they are doing when they choose law schools according to factors that also affect law school standing in the market for legal education. It may also be, as I suggested, that law schools with high tuitions, proliferating programs, and scholar-professors may be competing rationally given the structure of the market.

High tuitions, moving up in an arms race of competition for students, professors, and reputation reflected in a proliferation of new and expanded services and programs, as Hoxby suggests, may make sense given the competitive market today. It is not the product of a conspiracy of overpaid academics and the ABA accreditation process. But the fact that we can better explain the phenomenon does not mean all is well—or better, that law schools can relax. In particular, it certainly does not mean that all schools will succeed in the competition nor does it mean that the less privileged will benefit.

V. TENTATIVE CONCLUSIONS

The first point of this Article is that, as in the 1930s, the crisis rhetoric is evidence of the strength of the legal profession, not its weakness or decline. The argument about the worth of the law degree is for the most part an argument led by lawyers and law professors. One should not too easily dismiss a

84. AFTER THE JD, *supra* note 4.

85. The Law School Survey of Student Engagement (LSSSE) allows a more systematic inquiry into these relationships than in the past. An interesting step in showing these impacts is Carole Silver et al., *Gaining from the System: Lessons from the Law School Survey of Student Engagement on the Self-reported Gains of Law Students*, 10 U. ST. THOMAS L.J. (forthcoming 2013) (showing how various activities during law school contribute to reported gains in personal and intellectual development).

profession that controls the argument about the worth of the profession. Indeed, the same entrepreneurial initiative that brought lawyers and law professors to embrace the issue of the worth of law school has long been evident in the legal profession.

Despite assumptions of static markets and projections of slow growth in opportunities for lawyers, lawyers have been very successful in turning new social issues, technologies, and markets into a supply of new products that fulfills a new demand.⁸⁶ The obvious example is big litigation, as Marc Galanter pointed out.⁸⁷ Citing litigation and the puzzle of more lawyers and more demand, Sander and Williams recognized in 1988 that “an increased supply of attorneys might stimulate demand.”⁸⁸ We still do not know, as Lloyd Garrison noted in the 1930s, what the right number of lawyers might be.⁸⁹

The power of the law degree in a country—and potentially the globe—relates to the fact that politics and the economy are governed in the language of law, and those connections also make the law degree useful in other careers. The crisis literature belittles the value of a law degree for non-lawyer careers, seeing such claims as self-serving statements of recruiters and deans. Tamanaha opines simply that such individuals will not come to law school now: “Twenty years ago, or as late as ten years ago, when the debt load was more bearable, a law graduate who did not land a job as a lawyer might still have come out okay financially. . . . It makes much less economic sense to invest so much time and money in a legal education as a means to move up the ladder, especially for mid-career people who have fewer years of future earnings to recoup the cost.”⁹⁰

Others are more vehement. Leichter published an article ridiculing the notion that the law degree is good for other careers.⁹¹ Campos argues that data showing that from 1976 to 2010 ABA schools graduated 1.4 million individuals with JDs plus several hundred thousand from non ABA accredited schools, but

86. See Carrie Menkel-Meadow, *Too Many Lawyers? Or Should Lawyers Be Doing Other Things?*, 19 INT’L J. LEGAL PROF. 147 (2013) (suggesting new services that need to be undertaken by lawyers).

87. See, MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* 43, 115 (1991). See also YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE* 105-06 (2012).

88. Richard H. Sander & E. Douglass Williams, *Why Are There So Many Lawyers? Perspectives on a Turbulent Market*, 14 LAW & SOC. INQUIRY 431, 471 (1989).

89. A very interesting exchange in the early 1990s on the number of lawyers ideal for economic growth shows the difficulty of making the case for any given number. Charles R. Epp, *Do Lawyers Impair Economic Growth Debate: Do Lawyers Impair Economic Growth*, 17 LAW & SOC. INQUIRY 625, 628 (1992).

90. TAMANAHA, *supra* note 25, at 118 (2012).

91. Matt Leichter, *The Juris Doctor is ‘Versatile’ Thanks Mainly to Numerous Logical Fallacies*, THE AM. LAW DAILY (Aug. 14, 2012), <http://www.americanlawyer.com/PubArticleTAL.jsp?id=1202567415810&slreturn=20121001215227>.

only 728,000 lawyers counted by the Bureau of Labor Statistics, point to a “problem” and not a strength of the law degree.⁹² He further notes that the problem with the argument for the law degree in other careers is that “you can also do all those things if you don’t have a law degree—except practice law.”⁹³ He criticizes “the absurd way law schools credit themselves for the career successes of their graduates who aren’t lawyers.”⁹⁴

We do not have strong data on the role of law degrees in business and other careers. Those who have talked to business leaders with law degrees typically find, however, that they attribute much of their success to their legal training.⁹⁵ Further, from a sociological perspective, one would expect a mutual relationship between those practicing law and those using their facility in legal analysis and legal institutions in other settings. In short, as in the 1930s, the law degree is far from dead as a ticket to success in the United States.

Yet, as in the 1930s, the crisis rhetoric has a tilt with serious implications. In the Depression era, the crisis was seen by the elite members of the profession as a reason to crack down on the law schools that provided access to less privileged groups such as immigrants and their children. They were the ones creating too many lawyers, and such lawyers did not bring the proper demeanor and ethics to the profession.

Now we see the same theme in a different package. Potential law students are told that if they do not get into the highest ranking law schools, they should not attend. They are likely to incur too much debt and the only careers rewarding enough to handle that debt are the increasingly hard-to-get jobs in corporate law firms. The call is not for a denial of access, but rather for self-denial of the possibility of acquiring the benefits of a law degree and legal education.

Or the call is for law students outside of the elite to attend, if available as they are in California, low-cost alternatives that will not lead to substantial educational debt. And the call is for more low-cost alternatives there and elsewhere. The advocates of crisis once again have no problem with the elite schools, but they suggest that the lower ranking schools should shrink the time necessary to gain a law degree, cut the costs, de-emphasize legal scholarship, and increase teaching loads. The proposals are, in effect, to take the “two hemispheres” of the legal profession, which, I have suggested, are today much more fluid than in the past, and turn them into rigid categories. The affordable degree comes from a second-class law school designed for second-class careers. It is

92. CAMPOS, *supra* note 24, at 1.

93. *Id.* at 29.

94. *Id.* at 30.

95. I have talked to many such individuals as a two-time Dean and in interviews with numerous lawyers in business as part of projects for the American Bar Foundation. I have not found any law graduates in business who wished they did not attend law school. Of course, this is not systematic data devoted to this single question. After the JD also shows favorable opinions of the law degree for those in business in their early careers. After the JD II, *supra* note 4.

designed to take current hierarchies and turn them into a potential legal caste system. As in the past, critics take the opportunity to reinforce their own position as superior to the schools lower in the hierarchy.

The difference today from the 1930s in the law school market is that competition is now central to higher education. It is not easy to know just what position to favor today if the choice is between no access to higher education or access with heavy borrowing. The privatization and marketization of legal education and education generally have led to much higher tuitions and increasing inequality in obtaining the advantages of higher education. Recalling again what the response was in the 1930s, I would note the position of Francis Shea: "I premise again that democracy implies the absence of a ruling class which is self-perpetuating."⁹⁶

There is risk to attend law school and borrow extensively, but we still do not have the kind of default that many have been fearing for some time.⁹⁷ Further, it may very well be that those who invest in law school will find that they—and many others—will increasingly find programs such as Income Based Repayment plans. The government has a stake in finding ways to make higher education affordable. Finally, the rejection of an investment in a law degree may be, for many, a good economic decision, but of course it prevents the chance of success that might come through that legal education. It is instructive that we find the same literature and same argument with respect to the value of an undergraduate education.

In this era of increased competitiveness, answers are not simple. There will be winners and losers. But one must recognize the competitive logic. The exchange between Brian Tamanaha and Erwin Chemerinsky on the University of California-Irvine Law School is indicative. Tamanaha argues that Irvine should have created a lower cost law school as an alternative.⁹⁸ Chemerinsky asks why a new law school should not be the best it can be, even if with a very high tuition.⁹⁹ For understandable reasons, law schools to date have not rejected the terms of the competition explicitly and succeeded. There is no evidence that students will seek out such a school, that faculty will want to be there, that alumni will want to give back to such a school, and that the community that supports the school—UCI campus and Orange County—will want to invest in a

96. Shea, *supra* note 13, at 208.

97. No one has yet documented any dramatic increase above very low rates, although general data for law schools is not easy to find. See e.g., Henderson & Zahorsky, *supra* note 17.

98. Brian Tamanaha, *Why UC Irvine Went Wrong: Chasing Prestige at the Expense of Public Service*, BALKINIZATION (Aug. 27, 2012, 10:17 PM), <http://balkin.blogspot.com/2012/08/why-uc-irvine-went-wrong-chasing.html>.

99. Erwin Chemerinsky, *You Get What You Pay for in Legal Education*, NAT'L L.J. (Jul. 23, 2012), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202564055135&You_get_what_you_pay_for_in_legal_education&slreturn=20120727100109.

school set up to be mediocre according to the criteria by which law schools are judged.

Still, the competition drives up law school tuition and in fact steadily strengthens schools at the top and weakens those unable to compete by raising their tuitions. Hoxby notes that the competition leads to more investment in education but also more product differentiation within the competitive process.¹⁰⁰ It makes sense to expect such trends in legal education. What is not clear is that the winners and the losers in the competition will track the *U.S. News*. Location matters, for example, as does the related ability of law schools to raise funds from alumni. Decisions by law schools to make certain investments, such as particular professors and programs, will also have implications on the schools' competitive standing. There may be particular entrepreneurial strategies that work to move a school ahead in the competition, or there may be ways that law schools adapt if they are unable to keep up—perhaps, in fact, by carving out a niche as a school focused only on teaching and not at all on scholarship.

The story, interestingly, is very similar for large law firms. Many of the same commentators on law schools commented on the decline of Dewey & LeBoeuf, for example, suggesting that law firms got greedy and therefore abandoned their professional values.¹⁰¹ As with law professors, critics argue that lawyers should have worked harder and for less money. Too much greed, and not enough professionalism, led to trouble. Again, however morally appealing that story may be, there is little evidence that law firm partners' greed is what brought increased competition to the world of law firms or that law firms were responsible for the rankings among law firms.¹⁰²

The argument cannot be elaborated on here, but the clubby world of large law firms changed because the business world they serve got more competitive.¹⁰³ Lawyers had to compete for business instead of count on stable relationships, and that meant that they had to compete for the people that could bring the business to the firms. Corporate law firms are parallel to law schools in the sense that the competition is not all about price. Dewey & LeBoeuf continued to compete not by discounting, which would not attract and maintain the clients they sought, but by hiring rainmakers and seeking business. Through a combination of too much risk and bad luck, Dewey & LeBoeuf failed. The law schools that may fail or suffer real downturns may be high up on the hierarchy or low in the law school hierarchy—although, as with respect to the elite law schools, law firms in the various “magic circles” appear to be gaining a distance from those at the next level.

100. Hoxby, *supra* note 75, at 20.

101. Elizabeth G. Olson, *Dewey's Decline and the Rise of High-Risk Big Law*, *Fortune Management*, CNN MONEY (May 15, 2012, 12:19 PM), <http://management.fortune.cnn.com/2012/05/15/deweys-decline-and-the-rise-of-high-risk-big-law>.

102. *Id.*

103. See YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE* (2012).

Competition is the main feature of legal education and legal markets today. We can expect that in the future there will be law schools that merge, transform themselves, and even fail; just as we see with respect to corporate law firms and even NGOs. But the big picture is not changing as dramatically as the crisis advocates argue. Large law firms as an institutional arrangement of great prominence in American (and indeed global) society are not going to be pushed aside, even if a few fail. Nor are U.S. law schools. And, more fundamentally, the law degree remains an appealing option for ambitious and smart individuals in the United States. It has not been challenged successfully over the course of American history. The ability to be on both sides of the argument about law schools (and countless other issues of social importance) suggests that we should not expect that position to end soon.